

Having reviewed the entire evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a housekeeper by respondent. On July 31, 2001, claimant gave respondent notice that she was terminating her employment effective August 31, 2001. The claimant testified she injured her left shoulder and upper back while emptying a mop bucket at work on Sunday, August 5, 2001. The claimant testified she went to the emergency room the morning after the incident at work. The emergency room physician took claimant off work. The claimant presented the off work slip to her employer and was referred to Dr. Huffman for treatment.

Dr. Huffman diagnosed cervical strain/left shoulder strain, prescribed anti-inflammatory medications, and took claimant off work until August 22, 2001. The doctor also referred claimant for physical therapy. The x-rays did not reveal any abnormalities.

On August 23, 2001, claimant was released to return to work with restrictions to not lift over 7-10 pounds, no overhead lifting and to limit twisting and bending. When claimant returned to work on that date, the respondent requested that claimant prepare a list of light-duty jobs she could perform within her restrictions. The claimant prepared the list and was assigned those light-duty jobs, however, she only performed the work for one day because she testified the work required too much bending and twisting.

The claimant testified she advised her employer she could not perform the light-duty work and she never returned to work for respondent after attempting to work that day. Joan Russell, respondent's executive director, testified that claimant called on August 24, 2001, and indicated she had overslept and would be in late. Ms. Russell denies being told claimant could not perform the light-duty work.

The claimant has found employment as a day care worker where she testified her primary duty is to watch the children.

The claimant filled out an incident report which noted the date of accident as August 4, 2001. Initially, claimant told the respondent the accident date was August 12, 2001. The Application for Hearing filed with the Division of Workers Compensation alleged an accident date of on or about August 8, 2001. At the preliminary hearing the claimant testified that she is not good with dates and concluded the incident occurred on August 5, 2001, because she went to the emergency room the morning after the incident and the emergency room record of that visit is dated August 6, 2001.

#### **CONCLUSIONS OF LAW**

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that

right depends.<sup>1</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>2</sup>

Respondent argues that while there is no direct evidence to support a denial of compensation there is sufficient circumstantial evidence to establish claimant did not sustain accidental injury arising out of and in the course of her employment. Respondent notes claimant had already given notice before her alleged accident, gave several different accident dates, and the x-rays were normal. Respondent contends the cumulative effect of these facts leads to the conclusion claimant did not sustain personal injury by accident arising out of and in the course of her employment.

The Board disagrees. The respondent does not explain why the fact claimant had given a 30-day notice she was quitting would affect the legitimacy of her claim. The variance in the alleged dates of accident was explained by claimant and her explanation was corroborated by the contemporaneous medical records. Lastly, the fact that x-rays were normal does not indicate claimant did not sustain an injury which was diagnosed as a cervical/left shoulder strain. Such a strain would not necessarily be visible on x-ray.

The claimant's uncontradicted testimony established she sustained accidental injury arising out of and in the course of her employment on August 5, 2001, while emptying a mop bucket. The Board affirms the Administrative Law Judge's finding that claimant's injury is compensable.

Respondent next contends the Administrative Law Judge did not have authority to award temporary total disability benefits because claimant quit her job and there was no evidence that she was unable to work.

The Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.<sup>3</sup> Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision.<sup>4</sup>

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<sup>1</sup>K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

<sup>2</sup>K.S.A. 44-508(g). *See also* In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup>K.S.A. 44-551.

<sup>4</sup>*See* Taber v. Taber, 213 Kan. 453, 516 P.2d 987 (1973); Provance v. Shawnee Mission U.S.D. No. 512, 235 Kan. 927, 683, P.2d 902 (1984).

An Administrative Law Judge has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Therefore, Judge Avery did not exceed his jurisdiction. The issue of whether claimant's medical condition and employment situation entitles claimant to receive temporary total disability benefits is not an issue that is reviewable from a preliminary hearing order. At this juncture of the proceeding, the Board does not have the authority to reweigh the evidence and redetermine if claimant is temporarily and totally disabled.

The Board affirms the determination claimant sustained personal injury by accident on August 5, 2001, arising out of and in the course of employment. The appeal of the Administrative Law Judge's award of temporary total disability compensation is dismissed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated November 1, 2001, is affirmed. The appeal of the award of temporary total disability benefits is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2002.

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BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director